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No. 90-885

In the Supreme Court of the United States

OCTOBER TERM, 1990

KULDIP SINGH MUNDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the evidence at trial was sufficient to sustain petitioner's convictions on 25 counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of conspiracy to commit those offenses, in violation of 18 U.S.C. 371.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 16-27) is reported at 892 F.2d 817.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1989. A petition for rehearing was denied on September 5, 1990. Pet. App. 29. The petition for a writ of certiorari was filed on December 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on 25 counts of wire fraud, in violation of 18 U.S.C.

1343; one count of selling stolen goods in interstate commerce, in violation of 18 U.S.C. 2315; and one count of conspiring to commit those offenses, in violation of 18 U.S.C. 371. He was sentenced to seven years' imprisonment and fined $265,000. The court of appeals reversed petitioner's conviction for selling stolen property in interstate commerce, but affirmed on all other counts. Pet. App. 16-27. As a result of the reversal, petitioner's sentence was reduced to five years' imprisonment and a fine of $260,000. *Ibid.*[1]

1. The evidence at trial showed that petitioner and his co-defendants engaged in a scheme to defraud airline carriers of air fares through the exchange of airline tickets purchased in Nigeria for tickets on airline carriers operating in the United States.

a. Because of a severe balance of payments problem, the Nigerian government prohibited any person or business from removing currency from Nigeria without government approval. To evade those restrictions, some Nigerian residents would buy large blocks of airline tickets from several of the 22 airline carriers operating in Nigeria. They would then arrange to transport the tickets out of Nigeria through an intermediary, who would exchange them for new tickets issued by a travel agent on airlines operating in the United States. After selling the new tickets at a discount to U.S. customers, the intermediary would keep an agreed percentage for himself and the travel agent, and pay the remainder to the original Nigerian ticket holder. Gov't C.A. Br. 5-6.

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[1] On the count charging him with selling stolen goods, petitioner was fined $5,000 and sentenced to seven years' imprisonment, to be served concurrently with terms of five years' imprisonment imposed on the other counts. C.A. E.R. 42.

The airline carriers in the United States on which new tickets were issued pursuant to the above scheme stood to suffer substantial losses. Tickets purchased in Nigeria normally included a multi-leg trip, originating in Nigeria, with separate ticket coupons for each leg of the trip with other carriers. Payment for those tickets was made in local devalued currency to the carrier that sold the ticket in Nigeria; the other carriers would not receive payment until they submitted the ticket coupons to the carrier that sold the ticket at the end of each month after the later legs of the trip were flown. However, because the Nigerian tickets were usually endorsed "non-refundable" or "non-transferable" or "not valid unless travel commences in Nigeria," the Nigerian government would not authorize payment by the Nigerian carrier on exchanged tickets believed to have been exchanged improperly. Consequently, the U.S. airline carrier might not receive payment for its newly issued ticket at all or might receive only a reduced payment after months of negotiations. Gov't C.A. Br. 6-8, 22-24.

b. Petitioner acted as a ticket exchange intermediary. He arranged to exchange some Nigerian tickets through Targa Travel Agency (Targa) in Hayward, California. Targa was a member of the International Airlines Travel Agent Network (IATAN), a trade association of 66 affiliated airlines that regulates travel agents in the United States who are approved to write tickets for the airlines. The issuance of tickets by IATAN members and the disbursements of proceeds from ticket sales to the respective airlines are processed through the Airline Reporting Corporation (ARC). By written agreement, Targa was bound to sell airline tickets pursuant to ARC regulations, which prohibited the exchange of any tickets without the authority of the carrier issuing the new ticket and the carrier that had issued the original ticket. The ARC regulations also required that all ticket sales be reported to ARC weekly, and the airlines were to be paid

within one week of the purchase of a ticket, whether by check, cash, credit card, or authorized exchange. Gov't C.A. Br. 3-5, 8-9.

On December 6, 1986, two of petitioner's associates delivered 200 Nigerian tickets to Targa's offices. When petitioner arrived, he told Targa's manager, who unbeknownst to petitioner had agreed to cooperate with the FBI in an investigation of petitioner's activities, that the Nigerian tickets had a face value of $1.3 million. He offered to pay the manager 10 percent of the value of the tickets, with a $20,000 advance in cashier's checks, to exchange the tickets. Petitioner warned the manager that he would lose his license if ARC discovered that he was exchanging tickets in violation of ARC regulations. Petitioner had previously suggested that the manager should leave the country if the scheme were discovered by ARC and had urged the manager to delay sending weekly sales reports to ARC and to avoid referring to the exchanged tickets when such reports were sent. Gov't C.A. Br. 13-14.

After the manager agreed to the ticket exchange, petitioner's associates began issuing new tickets on Targa's computer showing "cash" rather than "exchange" as the form of payment. Gov't C.A. Br. 14. Shortly thereafter, petitioner and his associates were arrested. During the ensuing search, the FBI seized more than 200 Nigerian tickets, as well as the newly generated tickets issued by the Targa computer.[2] Gov't C.A. Br. 14-15.

2. The court of appeals affirmed petitioner's wire fraud and conspiracy convictions. Pet. App. 16-25. It first concluded that the district court properly instructed the jury on the wire fraud counts. *Id.* at 19-22. It also concluded

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[2] Twenty-five of the seized tickets formed the basis for the 25 wire fraud counts charged in the indictment. Gov't C.A. Br. 15; Superseding Indictment 9-10.

that evidence that petitioner's scheme involved a number of travel agencies was properly admitted at trial in connection with the wire fraud counts. *Id.* at 22-23. Finally, the court rejected petitioner's contention that the evidence at trial was insufficient to establish his criminal intent. *Id.* at 24-25.

The court of appeals reversed petitioner's conviction for selling stolen goods in interstate commerce. It concluded that confusion at trial over the precise nature of the charge against petitioner on that count required that the conviction on that count be vacated. Pet. App. 25-26.

ARGUMENT

Petitioner contends that the evidence at trial was insufficient to sustain his wire fraud convictions because it established an intentional breach of contract, not criminal fraud. Pet. 9-13.

1. Petitioner claimed before the court of appeals that there was insufficient evidence to convict him of wire fraud because he had relied on the advice of counsel and therefore lacked the necessary intent. He did not, however, assert what appears to be his present claim—that the evidence proved merely a breach of contract and was insufficient as a matter of law to establish fraud. See Pet. C.A. Br. 43-50; Pet. C.A. Reply Br. 20-21. Further review to consider the question presented by petitioner is therefore not warranted. See, *e.g.*, *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987); *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984).

2. In any event, petitioner's claim has no merit. It appears to rest on the proposition that petitioner could not be convicted of wire fraud if his scheme also resulted in an intentional breach of contract by the travel agency. To be sure, petitioner's ticket exchange scheme could succeed only if the travel agency violated the IATAN and ARC regula-

tions requiring the authorization of the airline carrier issuing the new ticket. The issuance of the new tickets without that authorization, however, was not merely a violation of a contractual relationship. It was also carefully calculated to deceive the U.S. airline carriers into believing that they had been paid or would receive payment for the new tickets. Petitioner's conduct therefore clearly amounted to a criminal fraud, for the purpose of the scheme was to enrich himself through the sale of the improperly exchanged tickets at the expense of the U.S. airline carriers, who were unable to obtain full repayment of the air fares from the carriers that issued the original Nigerian tickets.

3. Contrary to petitioner's contention (Pet. 11-13), his wire fraud convictions in this case are not inconsistent with *McEvoy Travel Bureau, Inc.* v. *Heritage Travel, Inc.*, 904 F.2d 786 (1st Cir.), cert. denied, 111 S. Ct. 536 (1990). In that case, Norton Company, which had used McEvoy Travel as its exclusive travel agent, awarded an exclusive contract to Heritage Travel and terminated McEvoy's services. McEvoy then brought a civil RICO action alleging that Norton, Heritage, and Heritage's president had fraudulently ousted McEvoy as Norton's exclusive agent through a pattern of racketeering activity consisting of numerous acts of mail and wire fraud. 904 F.2d at 787-788. In pertinent part, McEvoy alleged that, in an attempt to gain the required approval by two airline industry regulatory associations for the Norton-Heritage arrangement, Norton and Heritage had submitted a false contract concealing illegal payments and rebates. *Id.* at 789.

The court of appeals in *McEvoy* affirmed the dismissal of the complaint for failure to state a claim. In the passage relied upon by petitioner (Pet. 12), the court stated that "the deceptive submission of the phoney contract to the two associations, so that Heritage would be allowed to serve as Norton's agent, was [not] a scheme to defraud McEvoy

within the meaning of the mail and wire fraud statutes." 904 F.2d at 793. Because "securing the regulatory associations' approval by devious means * * * did not mislead, trick or deceive McEvoy," the court explained, there was "no causal connection, in the ordinary sense, between the fraudulent submission to [the two regulatory associations] and McEvoy's injury." *Ibid.* In contrast, petitioner's attempt to violate the ARC rules by exchanging tickets without securing authorization both deceived and injured the ARC-member airlines that were victims of petitioner's scheme.[3]

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[3] Petitioner claims (Pet. 7-8, 13) that his wire fraud convictions are inconsistent with *Florida* v. *Mundi*, 558 So. 2d 503 (Dist. Ct. App. 1990), in which an intermediate state appellate court dismissed charges against petitioner involving another travel agency in Florida. Even if there were such an inconsistency, further review would not be warranted to resolve a conflict between a federal court of appeals and an intermediate state appellate court. See Sup. Ct. R. 10.1. In any event, there is no inconsistency between the decision of the Ninth Circuit in this case applying 18 U.S.C. 1343 to petitioner's scheme and a Florida decision applying certain state criminal statutes to a similar scheme. Finally, it is far from clear that the Florida court would have disagreed with the Ninth Circuit. The court's entire opinion consisted of the following: "Affirmed. *See and compare Singh* v. *Florida*, 545 So. 2d 517 (Fla. 3d DCA 1989)." 558 So. 2d at 504. The court in *Singh* v. *Florida* had held that two defendants' convictions under state law for organized fraud, first-degree grand theft, and dealing in stolen property must be reversed "as no showing was ever made below of an organized fraud, a theft, or a dealing in stolen property as charged in the information." 545 So. 2d at 518.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

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